FILE COPY.

Supreme Court of the United States

October Term, 1906

No. 69

Office Supreme Court, U.
FILED.
OCT 29 1906
JAMES H. McKENNEY
CLERK

UNITED STATES, APPELLANT

vs.

THEODORE DALCOUR

et al., Heirs of John Forbes, et al., deceased, et. al.

Appeal from the District Court of the United States
for the Southern District of Florida

Brief of the Heirs of John Forbes, Appellees

Supreme Court of the United States

October Term, 1906

No. 69

UNITED STATES, APPELLANT, vs. THEODORE DALCOUR et al., Heirs of John Forbes, et al., deceased, et al. Appeal from the District Court of the United States for the Southern District of Florida. Brief of the Heirs of John Forbes, Appellees.

The Heirs of John Forbes, deceased, Appellees, respectfully submit their

Statement of the Case

This proceeding was begun March 3d, 1875, by the heirs of John Forbes on petition to the District Court of Florida at Tallahassee, under the provisions of the Acts of June 22d, 1860, and June 10th, 1872, for the recovery from the United States of land, script or warrant in lieu of a certain tract of land granted by authority of the King of Spain prior to the cession of the Floridas in payment of a debt due by the Spanish Government. On January 5th, 1818, John Forbes, by Royal License a Merchant at Pensacola, presented his petition to that government for the grant of the said certain tract of land in lieu of payment in cash of said debt, which was acknowledged by the Captain General of Cuba and the Floridas to amount to one hundred thousand dollars, and to have been incurred for

the fitting out of vessels commissioned by Spain, arms and stores, losses and indemnities during the period of disturbance that existed while the ownership of the territory was disputed by her enemies. Cienfuegos, the Captain General, reciting substantially the petition of John Forbes, in the grant declares "that the said sum can never amount to this sum in a very thinly settled province in which lands remain uncultivated for want of persons to attend to their culture, according to the information which has been taken, and particularly that of the Surveyor General of his Majesty, Don Vincent Sebastian Pintado," and "that Don Juan Forbes by taking possession of it will be able to benefit the province" "and let the commandant of the said place of Penzacola in virtue of this resolution put him in quiet and peaceable possession of the aforesaid land." This act and deed of the lawful authorities of Spain made and executed before the cession of the territory, and more than four years before the transfer of possession, had never been confirmed by the United States and was therefore an imperfect and inchoate title when the heirs of John Forbes, individually by their respective Christian names and surnames and by their respective residences designated, filed by their attorney in the District Court for the District of Florida their petition under the provisions of the said Acts of June 22d, 1860, and June 10th, 1872, on the third day of March, 1875. After a succession of misfortunes, including prolonged illnesses and deaths of parties and counsel and the total destruction by fire of the entire record of the case, the District Judge declared the grant valid.

From his decree the United States has taken the present appeal.

In order to emphasize the ruling facts in the case it is important to observe that at the time the United States acquired for a pittance possession of the valuable Floridas, there was a disposition on the part of our government to exact the strictest legal compliance with the terms of cession and thereby minimize the claims of grantees under the former sovereign; and it is equally important to note the liberality with which Congress subsequently removed legal obstacles to the confirmation of the very grants which the courts were previously obliged from want of jurisdiction to reject. From the time of General Jackson's military operations there has been a gradual tendency in Congress to ameliorate the difficulties attending the confirmation of Spanish land grants in the Southern States. The final recognition of them by the Act of June 22d, 1860, on the brink of civil war, is almost analogous to the long delayed recognition by the United States of the right to interest on Spanish indemnities some years before our late war with Spain.

The difference in feeling that existed between the Land Commissioners of 1825 and the Congress of 1860 is seen by comparing the narrow tone of the Commissioners' Report upon Large claims found in the American State Papers, Public Lands, Vol. 4, p. 155, with the liberal provisions of the Act of June 22d, 1860. In that report, acting under authority of Congress, they say: "As the United States have only stipulated to ratify all grants of a particular date made by his Catholic Majesty or his lawful authorities in the Floridas, Congress, it is conceived, can reject those which are not of that character, as would have been done no doubt by the government of Spain." This recommendation undoubtedly retarded but did not ultimately defeat the recognition of meritorious grants. Unques-

tionably the more enlightened policy adopted by act of Congress approved June 22d, 1860, was of slow growth, but the broad reasoning of the Justices of the Supreme Court of the United States in their application of the Act to particular cases is distinctly modern Americanism. Although this is the last cause that can possibly arise under that Act, the history of our relations with Spain, past and present, affords many examples to justify liberality rather than parsimony in dealing with a foreign power or those grantees claiming thereunder.

The Act of May 8th, 1822, provided for the appointment of three Commissioners "for the purpose of ascertaining the claims and titles to lands within the territory of Florida as required by the treaty of the twenty-second of February, one thousand eight hundred and nineteen" * * * "dated previous to the 24th of January, 1818." But provided, further, that said Commissioners "shall not have power to confirm any claim or part thereof where the amount claimed is undefined in quantity or shall exceed 1,000 acres, but in all such cases shall report the testimony, with their opinions, to the Secretary of the Treasury, to be laid before Congress for their determination."

The Act of May 26th, 1824, enabled "claimants to lands within the limits of Missouri and Territory of Arkansas to institute proceedings" for the same purpose. The Act of May 23d, 1828, 4 Stat. L. 284, was "an Act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida" * * * "containing a greater quantity of land than the Commissioners were authorized to decide" and provided that such claims "shall be received and adjudicated by the Judge of the Superior Court of the district in which the land lies."

John Forbes died in 1823, and in 1825 the Board of Land Commissioners had reported this grant to Congress as quoted above; but on November 6th, 1830, the Judge of the District Court of Florida, in which the land lay, rejected the claim. The petitioners were two claimants to an interest in the tract, who added as plaintiff "the heirs of John Forbes." The latter left two daughters, one of whom married Dalcour and the other Depestre. Both daughters lived in Cuba, and there is no reason to believe that they either authorized or had knowledge of the proceeding. The answer of the United States set forth that the said grant was not made to the two first named petitioners, John and James Innerarity, "that they were not in the purchase or grant of the said land or otherwise partners of the said firm of John Forbes and Co. Said grant was not made to them nor have they any interest in the said grant of land and therefore they have no right of petitioning for the same." * * * "If he had any heirs and legal representatives, such heirs and representatives should have been parties petitioners to this claim and ought to have been named by their Christian and surnames and not merely by the designation and name of heirs of and legal representatives of John Forbes, deceased."

The petitioners relied on the usual Spanish evidence of title, namely an exemplification of the expediente or original entries which contained the petition of John Forbes and the grant. Petitioners' exemplification was dated January 10th, 1818. On the trial they subpœnaed General Call, who had been commissioned by President Jackson to procure evidence from the archives in Havana, and also to represent the government against the grant, to produce the original expediente. On inspection they were surprised to find that the date January 10th

had been substituted for the real date, February 20th, which had been erased. Unfortunately for petitioners, there was no *salvado* or explanatory note of any kind whatever, and Judge Brackenridge admitted the document in evidence and rejected the claim. He said "a mere alteration of the date, names or other substantial matter in the original minute or record by erasure or interlineation does not of itself vitiate the record. It is only when it is corruptly done, for it may have been done in order to conform to the truth." But he also said there was no evidence of its having been corruptly done.

No appeal was taken from this dismissal of that petition for confirmation or any action under the Acts of 1844 and 1858.

Those really entitled were compelled to wait until Congress passed the Act of June 22d, 1860.

Then the Civil War broke out.

The reconstruction period followed and Congress extended the time for confirmation by the Act of June 10th, 1872, until three years after the date of that Act.

On March 3d, 1875, the heirs of John Forbes, all of whom were named by their Christian names and their surnames and further identified by their respective residences, began the present proceedings under the provisions of the Act of June 22d, 1860.

Then another difficulty arose which threatened to divert to strangers the entire proceeds of the claim.

One McCabe, who figures in the record as counsel for L. Z. Innerarity, soon after this proceeding was begun, secured a judgment for two million dollars against the legal representatives of John Forbes, the original grantee. The present suit

was begun March 3d, 1875, less than four months before it would have been barred forever. On December 14th, 1878, it is alleged, a petition was sworn to by a lady, aged, infirm and long since deceased, whereby new parties were admitted to two-thirds interest of the entire claim, the United States objecting to their right to become parties as it had objected in 1830. The McCabe judgment for millions against the heirs of John Forbes also had to be set aside, and that was not accomplished until 1887, when the judgment was reversed in the Supreme Court of the State.

In 1891 a greater catastrophe happened, when on the 19th of May in that year the town of Jacksonville, to which place the cause had been removed, was destroyed by fire and the court house and every vestige of the record in the case burned.

The case had been continued during the pendency of the McCabe judgment, and was so reported on the docket of the Attorney General at Washington. Subsequently a petition was filed for the restoration of the record, and afterwards a bill of revivor was filed and McCabe produced a copy of the record containing the alleged amendment of December 14th, 1878, made by himself. The Court restored the record.

The United States on November 21st, 1902, filed a motion to strike from the files of the restored record the alleged amendment dated December 14th, 1878, which admitted new parties to two-thirds interest on the ground that "the same constitutes a new suit and was not instituted and filed within three years from the tenth day of June, 1872," as required by the Act of Congress of that date. The parties admitted by this amendment are the descendants of those referred to in the answer of the United States in the suit before Judge Brackenridge in 1830

as not entitled to be parties in proceedings to confirm this grant.

The testimony on behalf of the petitioner for the restoration of the record was to the effect (1) that a clerk of the court who had served in that capacity since 1872 searched and found no files of the case after the fire (*i. e.*, May 19th, 1891). (2) That another clerk who had been so employed from 1874 to 1894 knew there was a petition, a copy of the State Papers, some subpœnas and some commissions issued and one or more lists of land. (3) That it was twenty-five years previous, but he remembered that he made a copy of the petition and certified to it for service on the United States District Attorney. (4) That it was commenced while Judge Frazer was on the bench, and he left the bench in 1876. (5) Counsel whose name does not appear of record had filed the petition for amendment of December 14th, 1878, admitting as parties descendants of the two petitioners objected to as parties by the United States in 1830, to two-thirds of the entire claim. (6) That he is long since deceased, but became counsel after the filing of petition for amendment, which was after the death of counsel for the heirs of John Forbes, who had filed their petition on March 3d, 1875. Widow of said counsel, who caused the alleged petition for amendment to be filed, although he was not attorney of record, testified that she visited with her husband the house of the one who swore to the said petition for amendment. (7) That one of the witnesses (McCabe) went to Tallahassee, where the suit was pending, with powers of attorney to collect a debt against John Forbes' heirs and that he had a judgment for two millions against Forbes, which was set aside, and that then the present suit was pushed against the United States until the

fire in Jacksonville, in 1891. But fortunately he had a copy of the record, which he offered in evidence.

The Court restored the record.

On motion to strike a plea to a bill of revivor subsequently filed it appeared that the plea was not to the whole bill, but only to a part thereof, to wit: The amendment filed December 14th, 1878, admitting new parties to two-thirds interest in the land.

The District Judge struck the plea. The United States District Attorney then moved to strike the amendment from the files of the restored record because it was not filed within three years from June 10th, 1872, which was denied.

The Court allowed the real date of the original expediente, to wit, February 20th, 1818, to be substituted for January 10th, 1818.

A master was appointed to ascertain the facts outlined above. His report was confirmed. The Court decreed the land and rights of entry to trustees for the benefit of those entitled as parties in interest whoever they may be, to be determined in a subsequent decree.

ARGUMENT

I

The Assignments of Error

There is nothing in these, it is submitted, to warrant a reversal of the entire degree. They are discussed on pages 11 to 32 of this paper book.

II

The Transcript of Record

Certified records of courts with an abundance of other well-authenticated facts are to be found in the record and fully justify a judgment as prayed for in the petition of March 3d, 1875, without considering, it is submitted, certain parts of this record which are irrelevant. It is analyzed on pages 33 to 43 herein.

III

The Decree

This is clear as to the confirmation of the grant, but involved as to "persons interested." *Vide* pages 43 to 54, this brief.

I

The Assignments of Error

There is nothing in these, it is submitted, to warrant a reversal of the entire decree.

In reply to the several Assignments of Error it is submitted:

I. It was not error for the Judge of the District Court to decree that papers claimed to be copies of the original record be restored to the files, because

(a) The re-establishment of its own record of a case is a discretionary power inherent in every court of general jurisdiction.

This power has been exercised in England and in the United States in a long list of cases.

In Sanderson *vs.* Walker, 1 Mylne and Craig's Report, p. 359.

A petition presented at the Rolls was afterwards heard by the Lord Chancellor, who made an order upon it; but before the order was passed the original petition was lost. The Lord Chancellor allowed a copy of it, certified by the under secretary of the Rolls, to be a true copy, to be filed in pursuance of the 27th of the new orders of December, 1833, instead of the original petition.

In Florida it has been recognized in a number of cases, as, for example:

Keen *vs.* Jordan, 13 Florida, p. 327.

Which was a bill in equity praying that the record of a judgment at law and an execution thereon which had been destroyed by fire might be re-established or supplied. It was

there held on demurrer to the bill that the power to supply a new record when the original has been lost or destroyed pertains to the court in which the record was made and is an inherent power in courts of general jurisdiction, although this power does not extend over the lost or destroyed record of a court of law. The Court said: "The power of supplying a new record when the original has been lost or mislaid is one which pertains to courts of record of general jurisdiction independent of legislation. It is an inherent power in such courts and has been acted upon in this State in Rhodes *vs.* Mosely, 6 Fla. 12, and in Pearce *vs.* Thackeray, decided at January Term, 1870. In Douglass *vs.* Yallop, 2 Burrow 722, a new judgment roll for a judgment rendered thirty years previous to a motion to supply the loss was ordered to be made. In Jackson *vs.* Smith, 1 Caines 496, a new nisi prius record was allowed to be made upon motion and affidavit that the original had been lost or burnt after six years. In White *vs.* Lovejoy, 3 Johns a fi fa on which a levy had been made was burnt and the Court ordered a new fi fa to be substituted.

The power has been long and frequently exercised in Alabama.

McLenden *vs.* Jones, 8 Ala. 298; Doswell *vs.* Stewart, 11 Ala. 629; Dozier *vs.* Joyce, 8 Porter 303; Williams *vs.* Powell, 9 Porter 493; Wilkinson *vs.* Brandon, 5 Ala. 608; Lyon *vs.* Bolling, 14 Ala. 753; Bishop *vs.* Hampton, 19 Ala. 792; 3 Ph. on Ev. 1066. Upon the destruction of any part of a record or of the process pleadings or orders in a suit the loss may be supplied by *making up others in their stead,* provided the Court is reasonably satisfied that the proposed substitute is of the *same tenor.* Upon that the Court where the suit is must exercise its

own judgment. Harris et al. *vs.* McRae's Adm'r, 4 Iredell 81.

The Supreme Court of the United States has recognized the principle in

Cornell *vs.* Williams, 20 Wallace 226,

Decided in 1873, where the records of a court were all burnt during the Rebellion and a copy of a copy admitted. The Court says: The secondary proof of the judgment in favor of H. H. Williams against Samuel M. Williams was properly admitted. The proof in question consisted of a copy of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existence of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. * * * "It was satisfactorily proven that thirty instead of sixty was correct, the latter being a mistake of the copyist. The principle established by this Court as to secondary evidence in cases like this is that it must be the best the party has in his power to produce."

(b) The Court has the power under the provisions of the Act of Congress, approved March 3d, 1871, 16 Stat. at Large 474, Ch. CXI, to allow proceedings to supply the record on application of the parties entitled merely and affidavit of the substance of the record, and that the destruction occurred through no fault of applicants, the McCabe alleged copy being therefore unnecessary.

II. The Court did not err in overruling the demurrer to the bill of revivor filed herein, because

The Court having ordered the further prosecution of the cause to be by the survivors of (August) Augustin Dalcour, Edmund Depestre and of the other parties to the petition filed March 3d, 1875, for the benefit of those lawfully claiming, decided the questions of law raised by the demurrer except as to the running of statute of limitations and laches and the amendment filed December 14th, 1878, admitting new parties after the expiration of the three years extended by the Act of June 10th, 1872. These were *reserved*, and are *possibly* referred to by the terms "other matters" in the Decree of April 8th, 1905.

In Johnson Adm'x *vs.* Diversey et al., 82 Ill. 446,

The facts were similar to the case at bar. In 1861 the administratrix, soon after the death of her husband, filed a bill for an account of partnership funds. Then the Civil War broke out, complainant moved to a State in rebellion against the government, and from 1862 to 1869 but little was done by either party towards securing a final trial. In the latter year the partner died, and in 1871 the record was destroyed in the Chicago fire. When it was found impossible to restore the records and files of the case with any degree of accuracy, the bill of revivor which had been filed was dismissed and a new bill filed. Held that there were no such laches shown on the part of the complainant as to deprive her of a standing in a court of equity, and that it was error to refuse to hear evidence on the merits of the case and to dismiss the new bill.

III. The Court did not err in granting the motion of claimants to strike from the files the plea of defendants to the bill of revivor, because

(a) It was not a plea to the whole of the so-called bill of revivor, but only to the alleged amendment of the bill filed December 14th, 1878, admitting claimants after they were barred by the Act of June 10th, 1872.

(b) The Judge of the District Court in his final decree confirming the grant reserves to the Court such further direction as to the respective undivided interests of the "original petitioners" and the heirs and legal representatives of such of the original petitioners as have died or may die before the termination of the suit "and of all *persons claiming* any rights to said land or said rights of entry *under them* or any of them" as may be necessary and as may be equitable and just. *Vide* Record, pp. 132, 133.

(c) A final order having been made in the original bill, there was no further action to be taken in the bill of revivor.

IV. The Court did not err in denying defendants' motion to strike the amended petition from the files, because

(a) The amendment of December 14th, 1878, in the restored record will have its proper weight in view of the Act of June 10th, 1872, so far as the two-thirds interest in the tract is concerned as claimed by the new parties named in the said amendment when the decree is carried into effect, the final decree of the Judge of the District Court recognizing the duty of complying with the principles of the Act of June 22d, 1860, and as may be equitable and just.

(b) In effect the decree awards the land and script to trustees for the use and benefit of such rightful parties as the Supreme Court shall recognize.

(c) If, according to the principles of the Act of June 22d, 1860, and by virtue of the Act of June 10th, 1872, the patents

and the rights are issued to the parties entitled under those acts, it is immaterial that the amended petition was not stricken from the files of the restored record. The amendment of December 14th, 1878, is founded on inadmissible evidence and therefore irrelevant.

(d) In view of the entire record having been accidentally destroyed by fire and restored by order of the Court anything alleged to be part thereof should be allowed to appear, in the absence of a jury, for what it is worth.

V. The Court did not err in granting claimants' motion to correct the date given in their petition as the date of the Captain General's deed to John Forbes, because

(a) Although impossible to have exercised this power at the trial in the suit dismissed in 1830 under the provisions of the Act of May 23d, 1828, yet this power to correct a date or mistake is necessarily implied, not only by the rules of equity, but also by the Act of June 22d, 1860, in order to decide upon the validity of the claim according to the principles of equity and justice.

In U. S. *vs.* Lynde, 11 Wallace 632,

The Court says: "If it should appear that a claim was honest and meritorious but defective in form or completeness, it might be the duty of the tribunals to sustain it as an equitable if not a strictly legal title."

(b) The policy of Congress respecting this grant is opposed to the policy of the general rule respecting deeds laid down in Pigott's case, 11 Co. 27, namely, that a material alteration by a stranger or an immaterial one by an obligee avoids the deed. Therefore that rule of law does not apply to the case at bar. Deeds containing erasures were held void because

they appeared on the face of them to be suspicious. The *reductio ad absurdum* is in Moore, 35 pl. 116, where a deed which had been rased was held void, although the party himself who made it had also made the erasure; which was permitting a party to avail himself of his own fraud.

(c) If the Spanish official who copied the grant made the erasure, his act permitted his government or its grantee, John Forbes, to avail themselves of their own fraud if the principle laid down in Moore, 35 pl. 116, be applied to the present case. Or if an agent of the United States, from motives best known to himself, was responsible for the alteration, it likewise operated to defeat claimants' right in the suit rejected by the Judge of the District Court in 1830.

(d) "The Act of June 22d, 1860, was intended to modify the harshness of previous acts and decisions." As early as 1828 the injustice wrought by the Statutes, 13th Eliz., Chap. 5th, and 27th Eliz., Chap. 4th, was recognized in Pennsylvania in the Common Pleas of Philadelphia County in the matter of Bradway's Est., 1 Ashmead 212, in which King, P. J., says: "The position is founded on the maxim that a deed made void in part by a statute is wholly bad, although at common law an instrument may be partially void and good for the residue. (13 Vener. Abr. 571, Bac. Abr. 541, 549, 10 Rep. 100.)" * * * "The settled construction, however, is that this rule is not applicable to fraud by construction of law, but only to such as are tainted by actual fraud."

(e) According to the old decisions where a mere mistake was corrected in a deed and not known by whom, it was held to avoid it, 2 Rol. Abr. 29 pl. D; but the whole tenor of the Act of June 22d, 1860, was for the purpose of giving relief

from the application of former acts and decisions.

In U. S. *vs.* Morant, 123 U. S. 335, the Court (in 1887) says the Act "was intended to give relief to a large class of grantees of former governments whose claims had been rejected by the different Boards of Commissioners and by the courts under the strict construction of the treaties which prior laws had required." And in discussing what range of discretion was intended says: "The probable meaning is, that these principles (*i. e.*, equity and justice) are to be applied to each particular case."

(f) It is held in the following cases that an amendment which changes a date does not change the cause of action. Wilsen *vs.* Phillips, 8 Kansas 211, Bussey *vs.* Rothschild, 27 La. 316, Bailey *vs.* Musgrove, 2 Sergeant & Rawle 219, which apply to the date of a promissory note, and Warren *vs.* Ocean Ins. Co., 16 Me. 439, to a policy of insurance, and Marshall First Nat. Bk. *vs.* Hosmer, 48 Mich. 200, where a judgment was corrected in Niemarck Schwartz, 51 Mich. 467, and Stevenson *vs.* Mudgett, 10 N. H. 338.

In a foreclosure suit plaintiff was permitted to amend by changing the alleged date of the maturity of the note. Jones *vs.* Henderson, 49 Ga. 170. In Reed *vs.* Scott, 30 Ala. 460, and in Moore *vs.* Christian, 31 S. Car. 337, an amendment was allowed changing the instrument sued on as a promissory note to a bond under seal.

In Fields *vs.* Ft. Worth & D. C. Ry. Co., 30 Southwestern Reporter, p. 255, "In an action against a railroad company for unjust discrimination in freight charges one of the facts complained of in the second amended petition (filed October 5th, 1891), was alleged to have occurred March 9th, 1889, but in

a third amendment (filed May 3d, 1892), plaintiff averred that the true date of such discrimination was April 20th, 1890. Held, that the cause of action was not barred by the two years of limitations."

VI. The Court did not err in decreeing that the grant made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, was a valid title against the United States, because

(a) It does not appear that the alteration was made by the claimants. Changes, however material, made in a document by a stranger to it are, in legal contemplation, wholy immaterial and ineffective to give to it any other or different meaning or operation than that which attached to it before such change.

(b) Viewed as a mutilation, it enabled the United States, the defendant in possession of the document, to win the suit; but no suspicion of wrongdoing was attached to either party to the suit.

(c) Inspection of the grant discloses the important fact that no attempt was made to commit a forgery. It was a self-evident erasure and substitution, but unfortunately without the sanction of a "salvado," or explanatory note.

(d) The fact that the document in the possession of the claimants at the trial under the provisions of the Act of 1828 was dated January 10th, 1818, and that the alteration in the document brought by the United States from the archives at Havana by Mr. Call was made to correspond therewith and made by one whose reasons for so doing and whose identity are unknown to the parties to the suit does not destroy the evidence contained in the document that the grant was made on

February 20th, 1818, which was before the cession of the Floridas to the United States, and therefore by virtue of the interpretation of the meaning of the Act of Congress approved June 22d, 1860, valid.

(e) The alteration of a deed of conveyance, though it may deprive the covenantee of all right to sell upon the covenants therein contained, does not affect the ownership of the property conveyed, and the deed may, it seems, still be adduced in evidence to show what was originally conveyed thereby, West *vs.* Steward, 14 M. & W. 47. In such cases, to use the words of Lord Abinger in delivering the judgment of the Court in Davison *vs.* Cooper, 11 M. & W. 800: The deed is produced merely as a proof of some right or title created by or resulting from *its having been executed.* (See Green *vs.* Attenborburough, Cam. Scac. 3 H. & C. 468, where this distinction was adopted, and also per Lord Esher, M. R., in Suffell *vs.* Bank of England, 92 B. D. 568. Also in the Earl of Falmouth *vs.* Roberts the rule as to the destructive effect of altering a written instrument was stated by Parke, B., to apply where the obligation sought to be enforced is *by reason of the instrument.*

(f) Such was the carelessness of the clerks in the government offices at Havana that in the case of Colin Mitchell the translator says: "These Spanish documents are most wretchedly copied, so much so at many times as to render them perfectly unintelligible and many other times, which is still worse, to make the sense entirely different from the one intended."

(g) The identity of the person who caused the original to correspond with the copy or his reasons for so doing are unknown. *Non constat,* that it was not a careless clerk's attempt to cover up his mistake or an overzealous United States em-

ployé's mistaken idea of loyalty to defeat an unpopular claim against his government.

VII. The Court did not err in decreeing petitioners entitled to a patent for lands of the tract not sold or otherwise disposed of and to private entry of public lands at one dollar and a quarter per acre for the area sold because the question of present owners is reserved for "further direction."

VIII. The Court did not err in deciding that a claim for lands in East Florida by virtue of a grant made by the Captain General of Cuba on the 20th day of February, 1818, could be confirmed under the provisions of the Act of Congress approved June 22, 1860, because

(a) This act makes the date of the transfer of possession to the United States, viz., July, 1822, the point from which to test the validity of the grant.

In U. S. *vs.* Morant, 123 U. S. 335,

Mr. Justice Bradley, in delivering the opinion of the Court says: The Act of June 22d, 1860, was intended to give relief to a large class of grantees of former governments whose claims had been rejected by the different Boards of Commissioners and by the Courts under the strict constructions of the treaties which prior laws had required. * * * The treaty by which the Floridas were ceded to the United States was not concluded and signed until the 22d day of February, 1819, and the ratifications were not exchanged until two years afterwards. The cession certainly did not take place, therefore, before the date named, and possession of the territory was not taken until July, 1822, whilst all the acts constituting the titles in question were passed prior to May, 1818. We cannot hesitate to conclude, therefore, that these

titles were completed within the time required by the Acts of 1860. The old cases have no application. Prior statutes inconsistent with the provisions of the Act of 1860 no longer control our decision.

In McMicken *vs.* U. S., 97 U. S. p. 204,

The Court says: "In 1846 McMicken instituted suit in the United States District Court of Louisiana against the United States under the provisions of the Act of June 17th, 1844, for the confirmation of the grant, but the suit was not prosecuted when called up for trial and was dismissed and judgment entered for the United States. In March, 1873, the present suit was brought under the Act of June 22d, 1860, entitled An Act for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri and for other purposes. The government does not stand upon formal conditions. The Act of 1860 expressly gives relief not only in cases of 'orders of survey duly executed, but when there has been any other mode of investure of title by separation of the land from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses and distances by the competent authority prior to the cession of the United States.

In D'Auterive *vs.* U. S., 101 U. S. 700,

Which had been presented to the District Court and appealed to the Supreme Court and rejected in 1859, Mr. Justice Clifford, in delivering the opinion of the Court (1879), says: "We adopt the construction given the last reported case upon the subject as follows: 1. That the claimant or those under whom he holds must have been out of possession for twenty years or more. 2. That the land must be claimed by a com-

plete grant or concession or order of survey or other mode of investiture in the original claimant by separation of the tract from the mass of the public domain, either by actual survey or defined, fixed natural boundaries or initial points and courses and distances, by competent authority prior to the treaty of cession. 3. That those conditions do not apply when the title was created and perfected during the period of the actual possession of him under whom the claim is asserted. Titles in fee simple which were complete when the jurisdiction of the province was transferred to the United States needed no confirmation, as they are fully protected by the treaty of cession. U. S. *vs.* Percheman, 7 Pet. 51, 88, U. S. *vs.* Wiggins, 14 id. 334, 349. 4. That the title must be complete under the former sovereign—that is, the land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise, that nothing must be left to doubt or discretion in its location; and if there was no actual survey previously made which a surveyor can follow, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*, or, in other words, the separation of the tract from the public domain must not be mere conjectural separation, but complete without any element of discretion or uncertainty. Scull *vs.* U. S., 98 U. S. 410, 418; Smith *vs.* U. S., 10 Pet. 326."

(b) The cases decided in 1852 do not govern the present suit, and the claims founded on the three grants in favor of Alagon, Punon Rostro and Vargas are within the purview of the proviso of the third section of the Act of 1860 and therefore null the Act of June 22d, 1860.

Moreover the history of the negotiations shows that no title founded on those grants could ever be declared valid, on one ground alone, namely, "the conditions of the said grants not having been performed," the principal condition being residence.

The history of this claim and the terms of the present grant answer this objection. John Forbes was a bona fide settler braving the dangers and vicissitudes of a loyal subject among the King's enemies, in peaceful pursuits, and there was a moral obligation on the part of Spain that passed to an equitable right long before the first proposals of cession, which the honor and dignity of the sovereignty of his Catholic Majesty put its stamp upon. The Captain-General made the grant an equitable one by his decree of January 5th and a complete one by affixing his signature February 20th.

The fixing of the date, January 24th, 1818, was merely a way of coming to terms. The distinguished negotiators, Mr. Adams and the Chevalier Onis, with the assistance of Mon. Hyde de Neuville, the French Minister, after projet and counter-projet, did finally agree upon it, but the reason for it was not only to exclude claims "qui no tienen merito," but were so extensive in area as to amount to a genuine spoliation.

The negotiators knew that the conditions of the grants had not been fulfilled by the King's favorites who remained in Spain, and on that ground alone an arbitrary date was fixed to avoid the examination of each claim.

Surely the United States will not avail itself of this technicality to aid Spain in repudiating any claim which is founded on such good consideration as appears in the history of this cause.

The Act of June 22d, 1860, Vol. 12, p. 85, provides in Section 1,

That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana or Missouri, by virtue of grant, concession, order of survey, permission to settle or other written evidence of title emanating from any foreign government bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated, shall be, and they are hereby, authorized to make application for the confirmation of their title to the lands so claimed in the manner following, to wit, etc.:

Section 11. And be it further enacted that in 'any case of such a claim to lands as is hereinbefore in the first section of this act mentioned, where the lands claimed have not been in possession of and cultivated by the original claimant or claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by any other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses and distances, by the competent authority, prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign

governments from which it emanated claimed sovereignty over, or had the actual possession of such territory, the person or persons, his, her, or their heirs, devisees, legal representatives or grantees, so claiming such lands, may, at their option, instead of submitting their claim to the officer or officers hereinbefore mentioned, proceed by petition in any district court of the United States within whose jurisdiction the lands or any part of the lands claimed may lie, unless such claim comes within the purview of the third section of this act, to which section the United States shall be made defendant, and it shall be verified by the oath of the party or parties, and conform to the provisions of Section 1 of this act, and to the practice of such court in chancery, and the attorney of the United States for such district shall defend against the same for the United States; and the court shall decide the claim valid or invalid according to the principles established in this act and decree accordingly. If the decree be against the United States an appeal shall be entered to the Supreme Court of the United States; and if it be against the claimant or claimants, he or they may take an appeal directly to that Court, as of right and course, without affidavit or security other than for costs; and the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeals in chancery, and as equity and justice and the principles aforesaid may require; which decision shall be final, and patent shall thereupon issue, if the claim be adjudged valid, for so much of the lands claimed as remain unsold; and for so much as may have been sold, the provisions of Section 6 of this act shall apply and be in force.

Section 3 empowers the commissioners to reject "for any cause sufficient in their opinion to justify such rejection," and

the *proviso* directs them to omit any claim theretofore rejected as fraudulent or twice rejected on the merits in their report of claims to the Commissioner of the General Land Office. The only rejection of any kind affecting this grant was that of the petition of James and John Innerarity on November 6th, 1830, in these words: "Being fully satisfied that *the claimants* have no *legal* grant prior to the 24th of January, 1818, I feel myself bound to reject *their petition*." Record, p. 80. He also says: "It is noted by the Commissioners before whom the testimony was taken that it was admitted 'by both parties that the official signatures to the document marked (A) under which the petitioners' claim are genuine.' I consider this admission as superseding all further inquiry," pp. 78, 79. Notwithstanding his able discussion of equitable grounds for affirmance he feels himself bound for the above reasons to reject their petition. It can hardly be said in this Court after such an expression from such a source that the grant to John Forbes comes within the purview of the third section of the act under which they claim.

It is submitted that a grant made before the cession, based on a previous equity, genuine as to signatures and description, ought not to be rejected because a date occurring during the preparation of the expediente was subsequently adopted by the terms of the treaty as a test of authenticity applying to all grants without affirmative proof of knowledge of such future test in the grantee and improper motives.

While the date applies to the enormous grants to the Duke of Alagon, Count Punon Rostro and Don Valgas and bring them within the purview of the third section of the Act of June 22d, 1860, the evidence before the court is totally different in the present case.

On January 5th, 1818, the Spanish government committed itself to the grant in the following decree:

HABANA, *y enero 5 de 1818.*

Para proveer lo que corresponda llevase al asesor gener[l].

CIENFUEGO. MIGL. MENDEZ.

En la Hab[a] en dicho dia la dice saber a D[n] Juan Forbes.

CIENFUEGO. MENDEZ.

Transcript of Record, p. 136.

I have carefully translated the above, and it undoubtedly means the Captain General's approval and direction to his Assessor General to advise correspondingly with the petition of John Forbes. Everything in the expediente after that is merely ministerial. The title passed January 5th, 1818.

IX. The Court did not err in deciding that the grant was not null and void by virtue of the 8th article of the treaty of the 22d of February, 1819, because

(a) Since the act of June 22d, 1860, the Court has recognized that Congress has prescribed a policy which waives the rights asserted by the Board of Land Commissioners in 1825 as to the date of the grant and by the Court under the strict construction of the treaties which prior laws had required.

In U. S. *vs.* Morant, 123 U. S. 335.

Already cited, this principle is expressly laid down. The Court says: "The old cases have no application. Prior statutes inconsistent with the provisions of the Act of 1860 no longer control our decision."

In McMicken *vs.* U. S., 97 U. S. 204, it appeared that suit had been instituted in 1846 under the provisions of the Act of June, 1844, and judgment entered for the United States. Notwithstanding this judgment the Court said: "In March, 1873,

the present suit was brought under the act of June 22d, 1860, entitled, 'An Act for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri, and for other purposes.' The Government does not stand upon formal conditions. The Act of 1860 expressly gives relief, etc."

In U. S. *vs.* Morant, 123 U. S. 335.

Which was begun like the case at bar, by petition filed under the 11th section of the Act of 1860, the Court says: "Whatever may be the proper construction of the 8th article, the Act of June 22d, 1860, 12 Stat., 85, makes the date of the transfer of possession to the United States, viz., July, 1822, the point from which to test the validity of the grants."

And further says: "This view of the subject (i. e., the duty of sustaining an equitable if not strictly legal title) relieves us from the ungracious task of construing treaties and reviewing the conduct and policy of the Government. Congress, by the Act of 1860, has declared its own policy, and left us simply the office of judicially carrying out its enactments in individual cases as they come before us. Congress has laid down the general rule by placing the grants in question on a platform of equality with grants made by our own Government, and has left to the tribunals the duty of examining the merits of particular applications."

(b) Article 8 of the Treaty of February 22d, 1819, was inserted to prevent a spoliation of nearly the whole territory by three Spanish noblemen residing abroad. This is narrated by Chief Justice Taney in Doe *vs.* Braden, 16 Howard, 654.

(c) The petition of John Forbes was based on the evidence pointed out by the land commissioners of 1824. An equitable right had accrued. Why the conveyance was not made by the

Indians, long before the proposals of cession, the commissioners say they do not understand. Am. State Papers Public Lands, Vol. iv. p. 172.

(d) Even before the Act of June 22d, 1860, there were equitable grounds for confirming the grant to the heirs of John Forbes. But the two daughters of the grantee, Señoras Dalcour and Depestre, lived abroad and probably were unacquainted with their rights. The petitioners of 1828, James and John Innerarity, were not entitled to sue for the confirmation, and, moreover, all Spanish grants were unpopular because every act of King Fernando VII. was viewed with suspicion on account of the Camarilla of Courtiers, who influenced him.

Although the declaration in the last clause of the eighth article of the Treaty of February 22d, 1819, is as sweeping as the objectionable grants to the Spanish Grandees, it is contended that it was not the intention of Mr. John Quincy Adams, the distinguished American Secretary of State, or of the Chevalier de Onis, the Spanish Minister who conducted the negotiations, to deprive a single bona fide grantee, whether by equitable or legal title, of the enjoyment of the same rights he would have enjoyed under the former sovereign. Their difficulty was to avoid fathering those illegitimate offspring of the King's bounty without disregarding obligations which the Spanish monarch considered more binding perhaps than legal ones. That the United States has no such consilerations of honor and dignity has long been, unfortunately, the mistaken feeling of the Spanish people.

Mr. Adams expressly declares in his counter-projet, No. 8, the reason for the insertion of so harsh a rule as a *date* in the distinction between good and bad titles. In that counter-projet he submits the following:

"All grants of land made by or in the name of his Catholic Majesty in the aforesaid territories after the 24th of January, 1818, shall be null, *the conditions of the said grants not having been performed by the grantees.*"

This language must have applied to the three foreign noblemen living abroad excepted at the ratification on October 24th, 1820, and not to John Forbes, whose grant was unconditional and who had settled long before on the land granted. 3 Foreign Relations, 619 et seq.

The purpose of a clause so contrary to the ordinary conception of right and justice ought to be known and the article interpreted accordingly.

Nothing can be gathered from the negotiations except what is even more favorable to the view. The efforts of the Southern members of Congress, however, aided by the conservatives from the North, finally resulted in the Act of June 22d, 1860, which extended the right of confirmation without reference to any date whatever "prior to the cession." This Act was for the benefit of a limited number of cases that had not been decided in 1852, among those that form the argument in the present cause of the District Attorney in the Court below, but which have no application because Congress passed the act for the very purpose of permitting the Courts to ignore such a shiftless method of ascertaining the rights of grantees under the former sovereign.

That such was the intention of Congress is evident from the omission in this act of any reference whatever to "January 24th, 1818," which was carefully inserted in all the preceding acts. But the act goes further than that. It enables the Court to remedy mistakes, either of law or of fact, wherever they

may occur by providing that upon appeal the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeal thereto *in chancery*, and as equity and justice and the principles thereto may require. But aside from the *exact* date of the grant there is sufficient evidence before the Court to stand the test of validity required by this Court, namely, that it was made before the date of cession of the territory to the United States, or the time of transferring possession, the point from which to test the validity of grants, as clearly laid down in United States *vs.* De Morant, 123 U. S. 335.

X. The Court did not err in overruling the exception to the report of the Master that there had been 1,190,495.45/100 acres of land within the boundaries of the grant as described in the petition herein disposed of by the United States, because:

(a) The question of the extent of the land within the boundaries of the grant was a question of fact properly submitted to the Master, whose finding upon the testimony must be held in the absence of contradiction, as correct.

(b) The testimony shows that the description in the grant was such that the judgment was rendered with precision. D'Auterive *vs.* United States, 101 U. S., 700, Scull vs. 98 U. S., 410, 418; Smith *vs.* U. S., 10 Pet., 326.

(c) The petition filed by Theodore Dalcour et al., the heirs of John Forbes, on the 3d day of March, A.D. 1875, described with exactness the said tract of land as in the grant specified, its townships and ranges, and annexed a map giving the exact location of each as they are known on the United States Surveys. This it is submitted being a complete compliance with the requirements of the Act of June 22d, 1860, as interpreted by the next above cited cases.

II

The Record

Certified records of courts with an abundance of other well-authenticated facts are to be found in the record and fully justify a judgment as prayed for in the petition of March 3d, 1875, without considering, it is submitted, certain parts of this record which are irrelevant.

Analysis of the record restored by the Court reveals the following pertinent facts:

First, that the grant was made by Cienfuegos, Captain-General of the Floridas, to Don Juan Forbes, vide record, pp. 134, 136, the last line and supra, pp. 157, 159, Idem, pp. 9, 15.

Second, that the legal title is valid by the laws of Spain, and is admitted to have been in Don Forbes alone, pp. 10, 74, 127.

Third, that numerous amendments and the copy of the petition of intervention (Record p. 19), contained in the Record are irrelevant, vide record, amendments, pp. 2, 5, 15, 17, 18, Amendment to Amendment, p. 21; Amendment marked "Exhibit D," testimony of William McCabe, pp. 40, 48, 14th paragraph; p. 52, 4th paragraph, "Exhibit E"; p. 53, paragraph B, "Exhibit F"; p. 56, paragraph 10; order page 62, line 2; p. 63, paragraph 2; p. 65, paragraph 2. Motion of the United States District Attorney to strike Amendment to Bill, p. 66, pp. 106, 107.

The most important of these is the reason for the Fourth Assignment of Error, p. 132.

Fourth, that since June 14th, 1900, when resident counsel notified the District Attorney at Jacksonville that he had on

that day presented to the Court a petition (not in the transcript of record) by and on behalf of nameless "persons interested" (Record, p. 1), numerous amendments to the record have been allowed or suggested by the Court below, which ought not to embarrass the question of the validity of the grant.

Fifth, that the purpose of these amendments was to introduce the so-called "persons interested" as "parties complainants" in the Court below, in express violation of the terms of the Act of June 10th, 1872; one of them, the United States says, was not in the record before the fire (Record, p. 48, paragraph 14th). The copy of that alleged amendment is dated December 14th, 1878.

Sixth, that the effect of that amendment alone (Record, p. 52, paragraph 4), is to divert two-thirds of the proceeds of the entire claim from the rightful parties to said persons alleged to be interested.

Seventh, that the real purpose of the suit appears in the original petition of March 3d, 1875, (Record, p. 14), to wit: That "they (the heirs of Forbes) have a judgment against the United States, as follows: First, for the land described in the grant to John Forbes," and not as stated in the above-mentioned notice to the United States to "John Forbes *and Company*" (Record, p. 1.)

Eighth, that the addition of the words "and company" throughout the record on all copies or any part thereof is unwarranted and misleading.

Ninth, the proceedings to restore the record have brought out facts which require the modification of the decree.

On page 37 in the testimony of William McCabe, managing director of the North American Life Insurance Company,

of Toronto, Canada, on an issue before the court whether or not there was case pending and whether the papers had been destroyed, the witness stated that in the year 1875 he was travelling in Europe with letters to "leading gentlemen in London."

From that source he obtained a so-called bond executed by John Forbes for sixty-two thousand dollars ($62,000), admitting the receipt of that sum as representative of the firm, in which Forbes' co-partners were William Panton, John Leslie and a brother, Thomas Forbes. That on this bond or receipt he subsequently obtained as counsel of record in a Florida court, a judgment in favor of the firm of Panton, Leslie & Co. for a sum "in the neighborhood of two million dollars ($2,000,000)," after having failed in his attempt to enforce payment of the bond by intervention in the present suit.

On page 19 there appears a copy of a petition of intervention presented February 11, 1876, in the names of Santiago Innerarity and the other named heirs of James Innerarity, and John Innerarity. This petition avers inter alia:

"That the legal title by the laws of Spain was in John Forbes alone, but he was equitably and morally bound to share this land with John and James Innerarity according to their interest in the partnership of John Forbes & Co. That John Forbes owned two-thirds of the capital of the partnership and John and James Innerarity owned each one-sixth, or one-third for the two."

They show that their right is equitable, but they are assured that the heirs of John Forbes, whenever it is possible, will make their equitable title fully legal.

They ask to be permitted to intervene, and that their equit-

able right be acknowledged by the Court as heirs of John Innerarity and James Innerarity, leaving a settlement of their rights among themselves to be made by themselves.

They ask that a judgment be rendered in favor of complainants for the whole amount which they claim, merely recognizing the right of intervenors for an account for one-third from them "and endorsed [Copy] Supplementary petition in re Forbes Heirs vs. U. S. Presented Feb. 11, 1876. Denied."

On page 30, before Judge Locke, in the same issue, Mrs. Edward Janin testified as follows: "I think Mr. McCabe had a great deal to do with that case. I know Mr. Janin said after he took this large case for Forbes he found there was a judgment against his people for a great deal of money. And he said he would never have undertaken this case had he known it was handicapped; it would cost him too much time from this business, and he would have to reverse the judgment before he could go on with the original case. I remember his saying to Des Chapelles and Innerarity when they would write to him to go on with the case, he said he could not do any more work on the case until he got that judgment out of the way.

Q. Did you know Madame Eugenie Olivie?

A. Yes; I went to her house in the country with my husband to discuss the case with her. She took us up to New Iberia, where she had a plantation. I think she was the granddaughter of John Forbes, and she was an old lady and walked with a crutch.

Q. Do you know whether or not the suit was brought by him (Mr. Janin)?

A. Yes.

Q. Do you know whether his name appeared as attorney in any of the papers?

A. Yes.

Q. Was his name signed to the petition in the case?

A. Yes.

Q. Are you sure about that?

A. Yes.

On page 15 is a copy made by McCabe, according to his testimony before Judge Locke on page 41, endorsed amendment to petition, file mark December 14, 1878 (*Note.*—This is the date of the transfer of the suit on motion from Tallahassee to Jacksonville), signed P. Walter, clerk, which petition is signed L. D. Olivier, Eug. B. Olivier, the contents thereof being sworn to by Theresa Dalcour, wife of Eugene B. Olivier. The averments are inter alia as follows: (1) "That it was by mistake and error that the grant of land first set up and described in the original petition was described and stated to be a grant to John Forbes, and they now aver that said grant was made to John Forbes and Company, a commercial partnership existing at the time of said grant. (2) That at the date of said grant, said partnership was composed of John Forbes, who was the principal partner of James Innerarity and John Innerarity. (3) That in the absence of any knowledge on their part and of any evidence to the contrary, the petitioners aver and admit that the interests of each of said three parties in said grant was one undivided third."

This was evidently the object of Mrs. Janin's visit to Madame Olivier's plantation at New Iberia in 1878, but the copy was made by Mr. McCabe. The latter testified on page 44 as follows:

Q. Whom do you represent?

A. I did not prepare myself to answer that question, and

at my time of life my memory is not retentive; I could not give you the names with accuracy.

Q. Could you give the names of some you represent?

A. Mr. L. N. Innerarity, of Baltimore.

And on page 46, Q. Were you instrumental in bringing about these proceedings to re-establish these records?

A. Personally I was not; I was approached on the subject by the other side—by the petitioner.

Q. Did you preserve these records with a view of restoring these proceedings?

A. No, sir; quite accidentally. They were taken in the first instance for the reasons already given. That must be entirely clear to you and must be to the Court. The records show for themselves; it is not a concocted case in any way.

It is here submitted that the testimony of Mr. McCabe and Mrs. Janin, both now deceased, may be included without affecting the validity of the grant.

The answer was filed within sixty days, to wit, April 12th. On April 15, Record page 49, Demurrer, inter alia, "Matters of law to be argued." (3) "That by statute any party or person interested in the destroyed records is privileged to make application for the restoration."

On page 50. "On motion of plaintiffs' solicitor the case was transferred from Tallahassee to Jacksonville and suit continued until next term. It is averred inter alia "(3) Said petitioners further set forth with *unnecessary particularity the facts* connected with the *making* and confirming *of said grant* by the lawful authorities."

On page 56 "(10) That thereafter said cause was by order made therein transferred into the Eastern Division of

said District Court on, to wit, the 14th day of December, A. D. 1878. Said petitioners *obtained an order* therein giving them leave and by authority of such leave of court filed therein their amended petition, alleging that said grant of land was made to John Forbes and Company; that *by mistake* the original petition averred that the grant was made to John Forbes; that John Innerarity and James Innerarity were partners of John Forbes and grantees with John Forbes of said tract of land. (11) Said amended petition added as petitioner the heirs of John Innerarity and James Innerarity and named them as follows," etc. There is no affidavit attached to bill referred to on page 65 as a so-called bill of revivor, nor is it signed by any one of the parties to the original petition. "And that there is no bill of revivor pending, a final order having been made leaving no action to be taken by the defendant except upon the original or amended bill." This is followed on page 66 by a motion filed by the Appellant "to strike said amendment to bill from the files of this suit." "Which amendment introduces a large number of other individuals alleged to be the heirs of John Innerarity and James Innerarity." "Upon the ground that the same constitutes a new and wholly different suit, and upon the ground that the same was not instituted and filed within three years from the 10th day of June, A. D. 1872, as required by law." The Court denied this motion, whereupon the United States filed its answer hereinafter referred to.

The Record shows that since the 14th day of June, 1900, the numerous amendments thereto allowed or suggested by the court below are almost invariably for the benefit of new parties or so-called survivors, or "parties interested," whose names were inserted as parties through the agency of an alleged

amendment, which the United States contended was never in point of fact filed, but if filed it was after the limitation of the Act of June 10, 1872, that is to say after June 10, 1875.

The Act of 1860 allowed twelve years in which to bring an action, and the Act of 1872 extended that period three years. The heirs of John Forbes, Appellees, filed their petition March 3, 1875, only three months and one week before they would have been barred forever. This is the earliest date in the history of the case on which their claim appears to have been presented to the court, except in 1829, when James and John Innerarity claimed one-sixth each and added as co-parties, "the heirs of John Forbes." On the trial of their claim the United States filed its answer, which appears on the Record in this case and is a certified copy from the records of the Circuit Court of Escambia county, Florida.

On page 74 the answer of the United States to that suit appears inter alia as follows: "This respondent further answering says that the said James Innerarity and John Innerarity were *not* in the purchase or the grant of said land or otherwise *partners* of the said firm of John Forbes and Co.; said grant was not made to them, *nor have they any interest in the said grant of land.* And therefore they have no right of petitioning for the same;" and further, "that the said John Forbes before the filing of the said petition departed this life. If he had any heirs and legal representatives, such heirs and representatives should have been parties petitioners herein and ought not to have been named by their Christian and surnames, and not merely by the designation and name of heirs and legal representatives of John Forbes, deceased." The Act of May 23, 1828, in Section 8, provides: "And so much of the said Act as

requires the claimants to make adverse claimants parties to their suits, or to show the Court what adverse claimants there may be to the land claimed of the U. S. be also hereby repealed."

The answer of the United States filed in the present suit coincides substantially with the above answer.

On page 67 the United States says, "That heretofore, to wit, on the 2d day of December, in the year eighteen hundred and twenty eight, John Innerarity, whose descendants and heirs at law are named as complainants in the petition herein on behalf of John Forbes and Co., filed a petition before the Honorable Henry M. Brackenridge, Judge of the Superior Court for the Western District of Florida, for the recovery of the very same rights, claims and causes of action as in this petition now pending are sought to be recovered." And on the 24th day of March, 1829, the said John Innerarity and James Innerarity for themselves assuming partners of the firm of John Forbes and Co. and for the heirs and legal representatives of John Forbes deceased, "filed a further petition and amendment for the very same grant," and on page 69 "défendant further answering says that the court has not jurisdiction over the subject matter of this proceeding, because there is no statute or resolution or permission, general or special, authorizing the bringing of this proceeding to establish a claim for lands alleged to have been granted to John Forbes and Co. as set forth in the petition herein." This proves, first, that the heirs of John Forbes were not bona fide parties to the suit decided against the claim by Judge Brackenridge; second, that the amendment objected to by the United States on page 66 rendered the answer good in law provided the amendment is good in law.

In other words, it changed to something else in law the

petition from a prayer for the confirmation of the title to John Forbes in accordance with the expediente or the entire record with signatures, rubrics and flourishes including his petition and the decree of the Captain General bearing the seal of King Ferdinand VII, that "John Forbes, chief and principal partner of that house *by taking possession of it* will be able to benefit the province" and "ordering that the necessary evidence be given to the house of Forbes to place *him, John Forbes, in quiet* and *peaceful possession* of the *above mentioned land*," to a petition for the confirmation to parties who had not proved their title or their partnership and, second, who were barred by the statute of June 10, 1872. While the title was thus placed in John Forbes the government ordained that "a copy" be given to the house of Forbes and Co. as evidence that government had made and granted the petition of Forbes in settlement of his own and the firm's losses, leaving it to Forbes to make settlement with his partners, which it is to be presumed he did.

There is no evidence on the record that he did not make such settlement unless the bond for sixty-two thousand be so construed. And there is no evidence that the affidavit of the aged and infirm Madame Eugenie Olivie, vide Record, pp. 17, 33, 35, which gave away two-thirds of the entire claim to persons barred by the statutes had any knowledge whatever of said partnership. There is nothing on the record to show whether the other heirs ever had a chance to be heard on the subject. At least, Mr. McCabe furnished Mr. Dewhurst with nothing of the kind. Nor did he say whether Judge Settle, who "reserved to all other persons interested in the litigation to take such exceptions as they may be advised and saving to the

United States all rights and exceptions which may arise under the Stat. of Lim.'s," ever made an order on such exceptions, which it is reasonable to suppose were filed but not copied by Mr. McCabe because he was only looking for what would help his own side, namely L. N. Innerarity, of Baltimore. His testimony on this point is found on page 42 of the Record.

The United States, in its answer, says: "The *amended* petition * * * which is sought to be re-established *was not filed*, as the petition alleged," and on page 63 in its Plea says this amended petition constituted a separate and independent suit, and if "filed on the 14th day of December, 1878, as aforesaid, was not filed within three years from the 10th day of June, 1872," and prays for the dismissal of the bill.

On page 65 Complainants move to strike this plea from the files because inter alia "(21) It purports to be a plea to the bill called a bill of revivor, but is in fact a plea to the amendment to the original bill filed by leave of court, December 14, 1878."

III

The Decree

This is clear as to the confirmation of the grant but involved as to "persons interested." A modification is respectfully submitted.

The Court below in framing its decree dated December 5, 1904, confirming the validity of the grant (Record, p. 107 et seq.) names certain persons as "survivors of the persons named in the original and amended petitions" previously authorized by order of the Court to prosecute the suit for the benefit of all persons claiming the land under certain other persons. These

certain ones out of the original petitioners and certain others whose names appear in the re-established record as full-fledged parties to the suit, it is further decreed, "or such of them as are now living, are entitled to receive from the United States a patent for all the above described tract of land not sold or otherwise disposed of by the United States and entitled to enter any of the public lands of the United States liable to private entry at one dollar and a quarter per acre to an amount equal in extent to that which has been sold by the United States within the boundaries of the above described tract." And further to "hold the said lands patented hereunder and said rights to enter under this decree for the use and benefit" of the parties to the amended petition filed December 14, 1878, who would take two-thirds, and the parties to the original petition filed March 3, 1875, who might get what is left after the reserve for "all persons claiming any rights to said lands or said rights of entry under them or any of them and as to all matters of costs, counsel fees and other matters," according to further direction to carry a subsequent decree into effect.

The decree dated April 8, 1905 (Record, p. 117), confirming the report of the master appointed to ascertain the lands within the boundaries of the grant holds that the lands therein which are undisposed of under the land laws of the United States are the property not only of John Forbes, but also James Innerarity and John Innerarity, "who are parties to this suit." Further, "that the survivors of the petitioner in this suit," naming certain of the petitioners and their assigns, are entitled to receive from the United States a patent or patents for the lands last above described and are entitled to enter any of the public lands of the United States to the amount and extent of

one million one hundred and ninety thousand four hundred and ninety-five and 45/100 acres of said entry to be made in conformity to the requirements of the 6th section of the Act of Congress approved June 22, 1860."

Further, that they "shall hold said lands patented herein, and said rights to enter the public lands of the United States for the use and benefit of the legal representatives" of those named in the amended petition and original petition as in the decree of December 5, 1904. And further as to the unsurveyed land not perfected into title by the several entrymen and unpatented swamp lands and also "as to the respective undivided interests of the original petitioners and the heirs and legal representatives of such of the original petitioners as have died or may die before the termination of this suit and of all persons claiming any rights to said lands or said rights of entry under them or any of them, and as to all matters of costs, counsel fees and other matters of like nature this Court reserves to itself such further direction to carry this decree into effect according to the principles of the Act of Congress of June 22, 1860, and as may be necessary and as may be equitable and just. Done and ordered in open court this 8th day of April, A. D. 1905. James W. Locke, judge." Endorsed "final decree." "E. O. Locke, clerk."

That the decree of the court below need not be regarded as interlocutory is shown in the case of Bank, of Mobile, *vs.* Hall, 6 Ala., 141. There the court below held that as between two parties the complainants had the paramount equity and referred the cause to a master to state an account. On appeal the Supreme Court of the State held that the judgment was a final one as to the question, notwithstanding the reference to the

master, and denied a motion to dismiss the writ on the ground that the decree was merely interlocutory.

Although further direction by the Court below is contemplated and the persons entitled to the land and script are made *cestqui trustent* of certain of the parties to this suit but are not designated by name, it is not necessary for the Supreme Court to dismiss the above decree or remand it for modification below, because

First. The Act of Congress, approved June 22, 1860, under which the proceedings were instituted by the heirs of John Forbes on March 3, 1875, outlines the procedure to be followed and expressly directs that "the same shall be adjudged de novo in the Supreme Court as in other cases of appeal thereto in chancery and as equity and justice and the principles aforesaid may require." The Act of March 3, 1823, provides that "actual settlers at the time of cession shall not be required to produce in evidence the deraignment of title, when unable, when the title has been recognized by the Spanish Government."

The Act of February 8th, 1827, Sec. 2, confirms conflicting Spanish claims, "provided that nothing in the foreign sections shall be construed to prevent or bar the judicial decision between persons claiming titles to the lands confirmed."

The Act of May 23d, 1828, Section 8, above referred to.

The Act of May 26th, 1830, Section 6, provides that all confirmations shall operate only as a relinquishment of the right of the United States.

The Act of June 23d, 1832, provides that "it shall be the duty of the Commissioner * * * upon the production of satisfactory proof of the death of the confirmee, or upon the

production of a regular chain of title from the confirmee to cause the patents to be issued to the heirs and legal representatives, or to the assignees of the confirmee, as the case may be."

Second. The right of a court of appeal to modify the decree of a lower court wherein the proceeding shall "conform to the practice of such Court in Chancery" is a distinct and settled rule of practice.

In 11 Encyclopedia of Pleading and Practice, p. 1068, citing numerous cases in States and United States Supreme Court the rule is expressed as follows: "An appellate court is vested with the amplest power to suit its judgment to the exigencies of each case that comes before it or to make its judgment effectively yield justice to the parties whose interests are involved. Accordingly an Appellate Court may modify or correct a judgment brought before it."

In Taylor on Procedure in Supreme Court, p. 717, it is said that where the facts are sufficiently before it the Supreme Court will render the decree that the court below should have rendered, and citing Penhallow *vs.* Doane, 3 Dall. 54, this rule is recognized in an admiralty case. In that case, at p. 107, it is held that the court is not under the same limitations as in a common law case. This can also be said of an appeal from the confirmation of a land grant, and especially where the Act compels the government to appeal.

In Stanley *vs.* Schwalby, 162 U. S., 255, 282, judgment had gone against the United States in trespass to try title to land. The Supreme Court considered the evidence, held that it was insufficient to sustain the judgment rendered and remanded the case (to the State court), with instruction to dismiss the

action against the United States. The case was tried without a jury, p. 265, and the Supreme Court of the United States held that this being so, the Supreme Court could render such judgment as should have been rendered by the court below, p. 282. The Court also decided: That the United States has and may assert a right, privilege, or immunity under the United States Constitution, which private parties could not have, that the dictum to the contrary in United States *vs.* Thompson, 93 U. S., 586, 588, is misleading.

That a judgment of a State court against the validity of an authority set up under the United States by defendants in an action of trespass to try title, so far as it necessarily involves the decision of a question of law, presents a question for review, by this Court, whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence:

That a decision based on insufficient evidence of a State in an action against its officers, that the United States had notice of a prior deed, and therefore had no title, and that judgment should be rendered against its officers for both title and possession, is a decision in a matter of law against the validity of the authority set up by them under the United States and is reviewable by this court:

That on reversing the judgment of the highest court of a State, the Supreme Court of the United States has power to instruct the State court to enter a judgment finally disposing of the case, instead of remanding it generally for further proceedings not inconsistent with the opinion of the Federal Court.

In City of Fort Scott Plaintiff in Error *vs.* Samuel G. Hickman, 112 U. S., p. 150, where a Circuit Court of the

United States, on the trial of an action at law before it, on the waiver of a jury, makes a special findings of facts, on all the issues raised by the pleadings, and gives an erroneous judgment thereon, which this Court reverses, it is proper for this Court to direct such judgment to be entered by the Circuit Court as the special finding requires.

In Cleveland Rolling Mill Company Plaintiff in Error *vs.* Charles D. Rhodes and Lizzie W. Bradley, Exrx. 121 U. S., p. 255, it is held that where it appears from the facts found by a Circuit Court of the United States, on the trial of a cause without a jury, that its judgment was erroneous, this Court may direct such judgments to be entered by that Court as its special findings require.

To the same effect in Meyer *vs.* Richards, 163 U. S., 415, this Court directed the entry of judgment for plaintiff for the value of Louisiana State Bonds. See the limitations prescribed in Egan *vs.* Hunt, 165 U. S., 189.

In the case of Jones *vs.* Williams, 108 Alabama, 282 (1895): A verdict was rendered for the plaintiff for a one-third interest in the land sued for. The judgment followed the verdict as to the recovery but ordered that a writ of possession issue for the land sued for, Held, that the error in this respect should be corrected by the Supreme Court without a reversal.

Durkee *vs.* Stringham, 8 Wisconsin, 1, quotes abundant authority for holding: That an appeal in chancery by one or more of several defendants or plaintiffs taken from the decree of the Court below generally and not from any collateral separate or distinct ruling, opens the whole case in the appellate Court for examination and for the reversal affirmation or such modification of the decree as the whole merits and equities of the case seem to require. The opinion in part follows: "The

first point that naturally presents itself is one of practice. Some of the appellees or Taylor, at least, as well as the appellant, Joseph Stringham, were satisfied with the decree of the Circuit Court, but neglected to take their appeal, supposing the appeal which was taken brought up the case for a rehearing in this Court, and necessarily opened the whole case for our consideration. But it is contended by the counsel for the appellant that this is a mistake, and that even if we should be of the opinion that the decree was not as favorable to Taylor as it should have been, still that we cannot modify or amend it to his advantage, he not having appealed. This question has been carefully considered in this case as well as in the case of Wood et al. *vs.* Spaulding, where the point was made and elaborately discussed by counsel.

In this case the appeal was from the whole decree while in the case of Wood *vs.* Spaulding the appeal was only from a part of the decree; and yet, in both cases we were led to the conclusion that the appeal to this Court opened the whole case, and that it was competent to modify the decree of the Court below and make it more favorable to the appellee, if the whole merits and equity of the case required that this should be done. The following are some of the authorities which, though not precisely in point, still have some bearing upon the question, and were considered in settling this rule of practice:

1 Tomlyn's Law Dict. Appeal; 1 Spencer's Eq. Jurs., 393, chap. 10; 2 Daniels, ch. Proc., 1222; 3 Id. 1602, 1628 to 1632; Hill *vs.* Chapman, 1 Sumners Vesey, 405, Note A; Consequa *vs.* Fauning, 3 John C. R. 587; Glover *vs.* Hodges, 1 Saxton, N. J. 113, R. S. chap. 84, 112.

More time might be spent in the examination of the question were it not since the adoption of the code it has no practi-

cal importance whatever, and therefore it will be dismissed without further remark."

Wickliffe *vs.* Owings, 17 Howard, 47, was a bill to quiet title. The Circuit Court dismissed the bill, but the Supreme Court rendered such decree in complainant's favor as the Circuit Court should have rendered.

In Becknell *vs.* Comstock, 112 U. S., 150, the Supreme Court examined the agreed facts and reversed the Court below with direction to enter judgment for defendant.

See also Elizabeth *vs.* Nicholson Paving Co., 131 U. S.:

Born *vs.* Schrenkeisen, 110 N. Y., 55. In that case a defendant below was given judgment in his favor. Upon the terms of the instrument sued on, the plaintiff should have recovered. The defendant, however, averred facts entitled him to reformation of the contract, and to judgment in favor on the contract reformed; but he omitted to pray for the reformation. The Court below gave him judgment, but did not order the reformation. On appeal, as all the elements of reformation appeared of record, the Supreme Court affirmed the judgment with the modification that it granted the reformation:

Clarke *vs.* State, 8 Gill J. (Md.) 111. Inadmissible evidence had been received at the trial below, offered by plaintiff. The verdict had gone in his favor. The verdict was sustained, however, by clear and undoubted evidence; and the inadmissible evidence was so clearly irrelevant that it could not have misled the jury. For the error in its admission, therefore, the S. C. refused to reverse:

Feder *vs.* Field, 117 Ind. 386. While cross errors may be assigned, the Court is not bound to consider them in every instance; but where the entire record and all the parties are

properly before the Court, the appellee will be awarded affirmative relief if he is entitled to it:

Patoka T. p. *vs.* Hopkins, 131 Ind., 142: "It is a mistake to suppose that an appellee who properly saves a question, and duly presents it by the assignment of cross errors, is not entitled to affirmative relief."

Ryan *vs.* Fitzgerald, 87 Cal., 345. In replevin, where defendant did not give security, the presumption on appeal is that the property was all delivered by the sheriff to the plaintiff: and on verdict and judgment for the plaintiff for *a part only* of the property, the Supreme Court will modify the judgment so as to require the return of the residue to the defendant. So modified, the judgment was affirmed.

Striking out the name of a party on appeal was ordered in the following cases:

Savage *vs.* Walshe, 26 Ala., 619: Judgment must be regarded as affecting only persons before the Court; the entry of judgment against one of the parties, who, as the record shows was not served and did not appear, is a mere clerical mistake.

Browner *vs.* Davis, 15 Cal., 9. Where judgment entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the clerk in entitling the cause, the error may be corrected in the S. C. or below, on motion.

Cruchon *vs.* Brown, 57 Mo., 38. Same.

Mitchell *vs.* Bridges, 113 N. Car., 63. "In looking over the entire record we have been able to discover but one error on the part of the Court. The defendant, * * * and Thomas Bridges, asked the Court to instruct the jury that there was no evidence that they had ever cut any timber or

otherwise trespassed upon the land. This instruction was refused, and, as we can find no such evidence on the record, we must hold that there was error in the refusal. As these defendants do not claim the land, and are only concerned about the judgment against them for the damages assessed by the jury, the erroneous ruling will not necessitate a new trial, but may be corrected by striking the names of these parties from the judgment. Modified and affirmed."

The decree should be modified by striking out so much thereof as attempts to specify present owners or those entitled in any way to anything from them and merely confirm the grant as against the United States and in accordance with the Spanish expediente or patent which consisted of the petition of John Forbes, the decree of Captain General Cienfuegios, the particulars of the claim and the signatures and rubrics of the authorized officials.

This modification is required for the following reasons:

I. It is reasonable to suppose that Congress intended to authorize decrees upon the validity per se of deeds or grants made by a government formerly in possession. In truth there is a provision in the act of Congress approved February 8, 1827, indicative of this intention. That act provides in Section 2, confirming conflicting Spanish claims reported in pursuance of the Act of May 8, 1822, "That nothing in the foregoing sections shall be construed to prevent or bar the judicial decision between persons claiming titles to the lands confirmed."

And although, as was said by Mr. Justice Bradley in one of his luminous opinions quoted in part in this brief, that the old decisions do not apply and the same may be said of the Acts of Congress prior to June 22, 1860, yet the principle embodied in that provision of the Act of 1827 is a good one, not repugnant

to the spirit of the later Act and especially applicable in this case.

In the present case the Court below having decided the grant valid, if the Supreme Court affirms that decision as against the United States and in accordance with the petition of John Forbes and the decrees of Cienfuego and applying the Acts of June 22, 1860, and June 10, 1872, confirms the title to the heirs of Forbes, who, it is humbly submitted are the only parties appearing on the record entitled to recover the land and script, then any person having equitable interest or right of contribution, whether mentioned in the decree of the judge below or not, may file his bill in the proper Court nearest the lands and prove his claim.

This, it is submitted, will separate the abstract question of right and the concrete one of persons in a manner best calculated to serve the ends of justice.

Therefore, for the reasons herein stated, it is submitted that the grant should be confirmed.

HENRY R. HATFIELD,
Counsel for the Heirs of John Forbes.